No. 17304

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

HOLLY-GENERAL COMPANY, DIVISION OF SIEGLER CORPORATION, RESPONDENT

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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JURISDICTION

This case is before the Court upon petition of the National Labor Relations Board, pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. Sec. 151 *et seq.*), for enforcement of its order (R. 26–28)[1] issued January 3, 1961, against respondent Holly-General Company, Division of Siegler Corporation. The Board's decision and order (R. 10–28) are reported at 129 NLRB No. 136. This Court has jurisdiction of the proceedings, the unfair labor practice having occurred at Pasadena, California, where respondent

[1] References designed "R" are to the printed record. References preceding a semicolon are to the Board's findings; succeeding references are to the supporting evidence. Relevant portions of the Act appear *infra*, pp. 11–13.

manufactures and sells heating and air-conditioning equipment (R. 11–12). No jurisdictional issue is presented.

STATEMENT OF THE CASE

I. The Board's findings of fact

The Board found that respondent failed to bargain collectively with the Union [2] by refusing to incorporate in writing and sign a collective bargaining contract which had been agreed upon within a year of the Union's certification by the Board as the bargaining representative of respondent's production and maintenance employees. The underlying facts are not in dispute and are summarized as follows:

On February 26, 1959, following a representation election at the plant, the Board certified the Union as the bargaining agent elected by a majority of respondent's production and maintenance employees (R. 12; 73–74). On January 6, 1960, after approximately 20 bargaining sessions, the Union accepted the terms of a contract proposed by respondent. The parties also agreed to add a wage reopener clause to respondent's proposed contract and then adjourned with the understanding that the contract would be submitted to the Union's members for approval or rejection (R. 13–14; 36–38, 46, 48, 51–56).

On January 18, 1960, respondent received a "decertification petition" signed by 110 employees in the bargaining unit requesting "a vote against union representation" (R. 14–15; 43, 95–97). On February 8,

[2] United Automobile, Aircraft and Agricultural Implement Workers of America, Western Region #6.

a Federal mediator notified respondent that the Union's membership had voted to accept the contract (R. 16; 46–47).[3] That same day, Employee Scharfenberg obtained the decertification petition from respondent's personnel manager and sought to file it at the Board's regional office (R. 17; 44, 51, 69–70, 65–69). A Board attorney refused to accept the petition because it was not dated and because the Union's certification was less than a year old (R. 17; 66–67). Scharfenberg returned to the plant and notified respondent's officials of the Board's rejection of the decertification petition (R. 17; 50, 67–68).[4]

On February 12, respondent advised the Union that it would not execute the contract because 60 percent of the employees in the bargaining unit had "expressed desires * * * against your continued representation" and because "the certification year expires in less than two weeks" (R. 18–19; 71–72). Respondent offered "to execute the final agreement" if a petition for an election was not filed within a reasonable time, if the Board refused to process such a petition, or if the Union won an election conducted by the Board (*ibid.*).

II. The Board's conclusion and order

On the foregoing facts, the Board affirmed the Trial Examiner's conclusion that loss of the Union's ma-

[3] The contract was rejected on January 21 at a union meeting open to all employees in the bargaining unit, but was approved on February 6 at a meeting limited to union member employees (R. 15–16; 56–59, 61–62, 99–101).

[4] Later that day, Scharfenberg prepared a second decertification petition which was circulated in the plant and subsequently filed with the Board (R. 17–18, n. 7).

jority support within a year after its certification by the Board did not relieve respondent of its duty to bargain with the Union during the certification year, and respondent therefore violated Section 8(a)(5) and (1) of the Act by refusing to execute the agreement reached with the Union during the certification year (R. 26, 19–20). The Board's order directs respondent to cease and desist from refusing to bargain with the Union and from in any like or related manner infringing upon its employees' rights under the Act. Affirmatively, the order requires respondent, upon the Union's request, to embody in a written agreement all the terms and conditions agreed to on January 6, 1960, including the wage reopener clause,[5] and to post the customary notices (R. 26–28).

ARGUMENT

The Board properly determined that respondent violated Section 8(a) (5) and (1) of the Act by refusing to honor the Union's certification before it had been in effect for a year

The Board's 1-year certification rule, which requires that, absent unusual circumstances, an employer must honor a certification based upon a Board election for a 1-year period even though the certified union is repudiated within the year by a majority of the employees in the bargaining unit, was approved by the Supreme Court in *Ray Brooks* v. *N.L.R.B.*, 348 U.S. 96. "The Court there decided that the one-year rule was within the power of the Board to make and its application was a matter within the Board's

[5] The Board corrected its order on February 16, 1961, to conform to the parties' agreement on a wage reopener clause (R. 30, *infra*, p. 10).

discretion." *Carpinteria Lemon Association* v. *N.L.R.B.*, 240 F. 2d 544, 557 (C.A. 9), cert. denied, 354 U.S. 909. See also *N.L.R.B.* v. *Henry Heide, Inc.*, 219 F. 2d 46, 47–48 (C.A. 2), cert. denied, 349 U.S. 952; *N.L.R.B.* v. *J. W. Rex Company*, 243 F. 2d 356, 360–361 (C.A. 3).

Respondent concedes that it refused within the certification year to sign a contract negotiated with the Union and approved by the Union's members. Respondent contends, however, that the Supreme Court's ruling in *Ray Brooks* is not controlling because in that case the employees' repudiation of the certified union occurred within a week of the Board election and not, as here, toward the end of the certification year. Nothing in the *Ray Brooks* opinion supports the distinction urged by respondent.[6] Rather, the Court noted that its decision had "special pertinence * * * to the period during which a second election is impossible" under Section 9(c)(3) of the Act, that is, during the year following a union's certification.[7] 348 U.S. at 104.

Respondent's further contention, that its refusal to execute the contract was warranted by the employees' rejection of the contract, is also without merit. The bargaining negotiators adjourned on January 6, 1960,

[6] The only case cited by respondent in support of its position, *N.L.R.B.* v. *Globe Automatic Sprinkler Co.*, 199 F. 2d 64 (C.A. 3), was alluded to and overruled in *Ray Brooks*, 348 U.S. at 102–104. See *N.L.R.B.* v. *J. W. Rex Company*, 243 F. 2d 356, 361, where the Third Circuit, citing *Ray Brooks*, enforced a Board order based on the 1-year certification rule.

[7] Section 9(c)(3) provides that no election shall be directed for a bargaining unit "within which, in the preceding twelve-months period, a valid election shall have been held."

with the understanding that the proposed contract would be submitted to a vote by the Union's members. Before submitting the contract to its members, the Union sought to ascertain at a meeting on January 21 whether the employees in the bargaining unit as a whole favored the contract. The rejection of the contract at this meeting was, of course, not binding upon the Union. It was no more than a factor which the Union might wish to consider in determining whether to press for acceptance of the contract by its members. Respondent, in effect, seeks unilaterally to make acceptance of the contract dependent upon the wishes of the employees in the bargaining unit. This it cannot do. *N.L.R.B.* v. *Darlington Veneer Co.,* 236 F. 2d 85, 88 (C.A. 4); *N.L.R.B.* v. *Corsicana Cotton Mills,* 178 F. 2d 344, 347 (C.A. 5); cf. *N.L.R.B.* v. *Wooster Division of Borg-Warner Cooperation,* 356 U.S. 342. As stated by the Fourth Circuit in *Darlington Veneer* (236 F. 2d at 88):

> The purpose of collective bargaining is to fix wages, hours and conditions of work by a trade agreement between the employer and his employees. *N.L.R.B.* v. *Highland Park Mfg. Co.,* 4 Cir., 110 F. 2d 632, 638. This can be done satisfactorily only if a bargaining agent is selected to represent all the employees with full power to speak in their behalf. The purpose of the statute would be largely frustrated if the results of bargaining must be submitted to a vote of the employees, with all the misunderstandings and cross currents that would inevitably arise in an election of that sort.

In sum, the purpose of the 1-year certification rule—to permit a union to negotiate a contract free from "exigent pressure to produce hothouse results or be turned out," and to assure an employer that "if he works conscientiously toward agreement, the rank and file may [not], at the last moment, repudiate their agent" (*Ray Brooks,* 348 U.S. at 100)—was accomplished by the bargaining here. Respondent itself concedes that the contract negotiated and approved by the union membership was completely acceptable to it. Its refusal within the certification year to execute the contract, in reliance upon the employees' repudiation of the Union, therefore frustrated bargaining stability. "The underlying purpose of this statute is industrial peace. To allow employers to rely on employees' rights in refusing to bargain with the formally designated union is not conducive to that end, it is inimical to it." *Ray Brooks,* 348 U.S. at 103.

For the foregoing reasons, we submit that the Board properly concluded that respondent violated Section 8(a) (5) and (1) of the Act by refusing to execute a contract negotiated within a year of the Union's certification by the Board as the collective bargaining representative of respondent's production and maintenance employees.

CONCLUSION

For the reasons stated, it is respectively submitted that the Board's order should be enforced in full.

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AUGUST 1961.

APPENDIX TO EXHIBITS

Number	*Identified*	*Offered*	*Received*
General Counsel's Exhibit 2	31	32	32–33
General Counsel's Exhibit 4	33	33	33
General Counsel's Exhibit 5	51	51	52
Respondent's Exhibit 1	43	45	46
Respondent's Exhibit 2	57	64	64
Respondent's Exhibit 3	58	64	64
Respondent's Exhibit 4	59	64	64

APPENDIX A

Order Correcting Decision and Order *

On January 3, 1961, the Board issued a Decision and Order [1] in the above-entitled proceeding from which there was an inadvertent omission.

It is hereby ordered that the said Decision and and Order be, and it hereby is, corrected by striking the words "clause with no-strike" from the last line of paragraph 2. (a), page 2, and from the last line of the first paragraph of Appendix A, made a part thereof, and substituting therefor the words "clause with waiver of the no-strike."

Dated, Washington, D.C., February 16, 1961.

By direction of the Board:

George A. Leet,
/s/ George A. Leet,
Associate Executive Secretary.

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* Caption omitted.

[1] 129 NLRB No. 136.

APPENDIX B

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

Rights of Employees

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representative of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement as authorized in section 8(a)(3).

Unfair Labor Practices

Sec. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * * * *

Representatives and Elections

* * * * *

Sec. 9(c)(3). No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held. * * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: * * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *

* * * * *

(e) The Board shall have power to petition any court of appeals of the United States, * * * within any circuit * * * wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order

of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record * * * Upon the filing of the record with it, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the * * * Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

U.S. GOVERNMENT PRINTING OFFICE: 1961